

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF MELROSE TIRE
SERVICE INC. RED TAG PLACEMENT
AND INELIGIBILITY FOR DELIVERY
FID #7154, NOV #15 201906050088**

No. PSTB 21-52

SETTLEMENT AGREEMENT AND STIPULATED FINAL ORDER

Pursuant to 20.1.5.600(B) NMAC, the Petroleum Storage Tank Bureau (“Bureau”) of the Resource Protection Division (“Division”) of the New Mexico Environment Department (“NMED”) and Dale Bigler and Terry England, owners and operators (Owner ID No. 76316/ Operator ID No. P18911) of the storage tanks located at Melrose Tire Service Inc., 800 Denby Avenue, Melrose, New Mexico (“Facility”) (Facility ID No. 7154) (collectively, the “Parties”), have entered into a Settlement Agreement and Stipulated Final Order (“Final Order”) to resolve the appeal of the Notice of Intent to Red Tag issued on November 5, 2019 and subsequent red tags affixed to six aboveground storage tanks (“ASTs”) (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212) located at the Facility.

Delivery Prohibition is authorized by the Hazardous Waste Act (“HWA”), NMSA 1978, Sections 74-4-1 to -14 (1953, as amended through 2021), and the Petroleum Storage Tank Regulations (“Regulations”) 20.5 NMAC, which includes the delivery prohibition regulations found at 20.5.116 NMAC. For the purpose of this Final Order, the Parties admit to the jurisdictional allegations and relief specified herein.

I. BACKGROUND

A. PARTIES

1. NMED is an agency of the executive branch of the State of New Mexico created pursuant to NMSA 1978, Section 9-7A-4 (2005).

2. NMED is charged with the administration and enforcement of the HWA and the Regulations.

3. Pursuant to the Delegation Order dated May 24, 2021, the Secretary of the Department has retained signatory authority to execute Settlement Agreements and Stipulated Final Orders.

4. Dale Bigler is the registered owner with NMED and Terry England is an operator as defined by 20.5.10.7 NMAC (“Tank Owners/Operators”) for the ASTs (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212), located at the Facility.

B. NATURE OF DISPUTE

5. On August 12, 2019, NMED issued a Notice of Violation (“NOV”) to Dale Bigler for the ASTs in violation of the Regulations, pursuant to 20.5.116.1602(B)(1) NMAC. The NOV informed Dale Bigler that the violations must be corrected within thirty days from the date of the NOV.

6. The violations alleged within the August 12, 2019 NOV were:

- a. Failure to meet upgrade requirements for existing single walled AST systems installed on, or before, July 1, 2001, pursuant to 20.5.109.908.(A)(2) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);
- b. Failure to install a containment sump at any point where piping transitions

from above the surface of the ground to below the ground surface on an AST, pursuant to 20.5.109.913(D) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);

- c. Failure to repair significant cracks in floors and wall of concrete secondary containment, pursuant to 20.5.110.1002(E)(2) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);
- d. Failure to ensure spill prevention equipment is liquid tight, maintained, and fully operational, pursuant to 20.5.110.1005(C) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);
- e. Failure to perform a precision line tightness test every 12 months for ASTs installed prior to July 24, 2018, pursuant to 20.5.111.1105(A)(3)(a) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);
- f. Failure to protect steel piping in contact with an electrolyte from corrosion, pursuant to 20.5.109.913(A) NMAC (Tank ID No. 34207); and
- g. Failure to ensure that piping is compatible with any regulated substance conveyed in an AST system, pursuant to 20.5.109.913(B) NMAC (Tank ID No. 34207).

7. The violations in the August 12, 2019 NOV were not corrected within the required timeframe, so NMED issued a Notice of Deficiency (“NOD”) pursuant to 20.5.116.1602(B)(2) NMAC, on September 12, 2019, alleging the same violations as the August 12, 2019 NOV. The NOD informed Dale Bigler that the violations must be corrected within thirty days from the date of the NOD.

8. The violations in the September 12, 2019 NOD were not corrected within the required timeframe. As such, NMED issued two Notices of Intent to Red Tag (“NOIRT”) for Class A and Class B violations to Dale Bigler for ASTs at the Facility on November 5, 2019, pursuant to 20.5.116.1602(B)(3) and 20.5.116.1603(A) NMAC.

9. The violation alleged within the November 5, 2019 NOIRT for the Class A violation was for failure to protect steel piping in contact with an electrolyte from corrosion, pursuant to 20.5.109.913(A) NMAC (Tank ID No. 34207).

10. The violations alleged within the November 5, 2019 NOIRT for Class B violations were:

- a. Failure to meet upgrade requirements for existing single walled AST systems installed on, or before, July 1, 2001, pursuant to 20.5.109.908.(A)(2) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);
- b. Failure to install a containment sump at any point where piping transitions from above the surface of the ground to below the ground surface on an AST, pursuant to 20.5.109.913(D) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);
- c. Failure to repair significant cracks in floors and wall of concrete secondary containment, pursuant to 20.5.110.1002(E)(2) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);
- d. Failure to ensure spill prevention equipment is liquid tight, maintained, and fully operational, pursuant to 20.5.110.1005(C) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);

- e. Failure to perform a precision line tightness test every 12 months for ASTs installed prior to July 24, 2018, pursuant to 20.5.111.1105(A)(3)(a) NMAC (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212);
- f. Failure to ensure that piping is compatible with any regulated substance conveyed in an AST, pursuant to 20.5.109.913(B) NMAC (Tank ID No. 34207).

11. The violation alleged in the Class A NOIRT was resolved after the issuance of the NOIRT.

12. The violations alleged in the Class B NOIRT were not resolved after issuance of the NOIRT and so the Bureau affixed red tags, as defined in 20.5.101.7.R(3) NMAC, on six ASTs (Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212) at the Facility on September 29, 2021, pursuant to 20.5.116.1602(C) and 20.5.116.1603(A) NMAC, and a certificate was posted at the Facility in accordance with 20.5.116.1603(B) NMAC. Additionally, the Bureau notified all product deliverers of the red tags by posting the name and address of the Facility on the Bureau's website, which contains a list of facilities with storage tanks that are ineligible for delivery, pursuant to 20.5.116.1606(B) NMAC.

II. COMPROMISE AND SETTLEMENT

13. On October 4, 2021, Dale Bigler submitted a timely written Request for Hearing to the Office of Public Facilitation ("OPF") pursuant to 20.5.116.1611(A) NMAC, requesting a hearing before the Secretary of the Environment to appeal the red tags that the Bureau affixed to Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212.

14. On October 5, 2021, Dale Bigler informed NMED that the Facility is

located in a rural and remote area, as that term is defined in 20.5.101.7 NMAC, because the facilities nearby do not sell red-dyed diesel (i.e. farm fuel) and the facilities that do sell red-dyed diesel are more than 20 miles away from the Facility.

15. On October 6, 2021, the Bureau issued a Rural and Remote Deferral of Red Tag for Tank ID 34211 at the Facility to ensure the farmers in the area receive red-dyed diesel for the 2021 harvest season. Pursuant to 20.5.116.1608 NMAC, the Bureau deferred application of delivery prohibition and removed the red tag for Tank ID 34211 for 90 days. The 90-day timeframe began when the Bureau removed the red tag on October 8, 2021 and it will terminate on January 6, 2022. The Bureau did not defer application of delivery prohibition for the other ASTs, Tank ID Nos. 34207, 34208, 34209, 34210, and 34212, since there are facilities less than 20 miles away from the Facility that provide access to motor fuel.

16. On October 7, 2021, OPF held a Scheduling Conference with the Parties and a hearing date was scheduled for October 13, 2021 at 9:00 a.m.

17. On October 12, 2021, NMED and Dale Bigler filed a Joint Motion for Extension seeking to postpone the hearing from October 13, 2021 to November 3, 2021 so the Parties could seek an alternate resolution to this matter.

18. On October 12, 2021, the Hearing Officer issued an Order granting the Joint Motion for Extension so the Parties could seek an alternate resolution to this matter.

19. As a result of the settlement discussions, the Parties have entered into this Final Order.

20. The Parties agree to the following conditions:

- a. The Tank Owners/Operators shall meet the requirements for retraining of

Class A/B Operators following significant violations as required in 20.5.104.406(B) NMAC;

- b. The red tags will remain affixed on the ASTs with Tank ID Nos. 34207 and 34212 with the understanding that the Tank Owners/Operators will remove all fuel within 30 calendar days from the effective date of this Final Order and permanently close these two ASTs in accordance with the requirements of 20.5.115.1500 NMAC as soon as possible but no later than August 5, 2022, as discussed in sub-paragraph 20(h) of this Final Order. Fuel shall be removed so there is less than one inch of product in the ASTs. The Tank Owners/Operators shall dispose of the fuel according to applicable law. Within seven calendar days after fuel removal and disposal from the ASTs with Tank Nos. 34207 and 34212 is complete, the Tank Owners/Operators shall provide the Bureau with documentation of the disposal, including but not limited to, a third party manifest;
- c. Based upon the fact that the Tank Owners/Operators have committed to permanently closing the ASTs with Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212 and will install four new underground storage tank (“UST”) systems, the Bureau will remove the red tags on the ASTs with Tank ID Nos. 34208, 34209, and 34210 within two business days from the effective date of this Final Order;
- d. The Tank Owners/Operators are responsible for promptly pursuing any funding needed in order to comply with the deadlines in this Final Order;

- e. The Tank Owners/Operators are responsible for promptly ordering the four new UST systems and any equipment for the UST installation discussed in sub-paragraph 20(f) of this Final Order, in order to meet the deadlines in this Final Order. Within seven calendar days after the Tank Owners/Operators order the new UST systems, they shall provide the Bureau with documentation confirming the order of the new UST systems along with projected delivery dates;
- f. The Tank Owners/Operators shall hire a certified UST installer that meets the requirements in 20.5.105 NMAC to install four new UST systems pursuant to 20.5.106 NMAC. At least 60 calendar days prior to installing the four new UST systems, the Tank Owners/Operators shall submit documentation to the Bureau demonstrating that they have entered into a contract with a UST certified installer, that meets the requirements of 20.5.105.500 NMAC and 20.5.105.505 NMAC, for the installation of four new UST systems;
- g. The Tank Owners/Operators shall submit documentation to the Bureau demonstrating that they have received estimates for the permanent closure of the ASTs with Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212, along with a proposed schedule for permanent closure, and a copy of a contract for the permanent closure, at least 90 calendar days before the scheduled permanent closure of any or all tanks. Permanent closure means the ASTs will be removed or rendered permanently unusable;

- h. The Tank Owners/Operators shall permanently close the ASTs with Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212 pursuant to 20.5.115.1502 NMAC and shall meet the notice requirements of 20.5.115.1500 NMAC no later than August 5, 2022;
- i. If the ownership of the ASTs with Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212 changes (e.g., if the tanks are sold, leased or transferred) prior to August 5, 2022, the Bureau will affix red tags to the ASTs immediately and without notice;
- j. Bureau staff will conduct periodic unannounced inspections to verify that the ASTs with Tank ID Nos. 34207 and 34212 are not in use and that product has not been placed in the tanks; and
- k. The four new UST systems discussed in sub-paragraph 20(e) of this Final Order, shall be fully operational as soon as possible but no later than June 1, 2022.

21. Failure by the Tank Owners/Operators to meet any of the deadlines or requirements outlined in sub-paragraphs 20(a) through 20(k) of this Final Order constitutes a violation of this Final Order. The Tank Owners/Operators will be required to remit stipulated penalties of \$100 per day for each violation until the requirements or deadlines have been met. The stipulated penalties shall be collected pursuant to NMSA 1978, Section 74-4-10(J) of the HWA. The Bureau shall issue a written notification to the Tank Owners/Operators of the requirement(s) or deadline(s) that have not been met.

22. If the Tank Owners/Operators fail to come into compliance with the

requirements in sub-paragraphs 20(a) through (k) of this Final Order within 30 calendar days from the date of the Bureau's notification letter issued pursuant to paragraph 21 of this Final Order, the Tank Owners/Operators will be required to remit stipulated penalties of \$200 per day for each ongoing violation until the requirements or deadlines have been met.

23. The Bureau shall issue weekly invoices for the stipulated penalties. If the Tank Owners/Operators fail to remit payment for the stipulated penalties, NMED may seek enforcement of this Final Order by administrative or judicial action, as discussed in paragraph 28 of this Final Order.

24. If permanent closure of the ASTs with Tank ID Nos. 34207, 34208, 34209, 34210, 34211, and 34212 does not occur by August 5, 2022, as required by sub-paragraph 20(h) of this Final Order, immediately and without notice the Bureau will affix red tags to the tank or tanks that have not been permanently closed.

25. Payment for the stipulated penalties shall be made to the *State of New Mexico Hazardous Waste Emergency Fund* by certified or corporate check, or by ACH deposit. On the date that delivery of funds by check or ACH is confirmed, the Tank Owners/Operators shall notify the Bureau contacts discussed in paragraph 26 of this Final Order. Certified or corporate checks shall be sent to the following:

New Mexico Environment Department
Petroleum Storage Tank Bureau
c/o Program Manager
2905 Rodeo Park Dr. East, Bldg 1
Santa Fe, New Mexico, 87505

26. All communications regarding the components of this Final Order shall be sent to:

PSTB.Inbox@state.nm.us

With copies to:

Dana.Bahar, Bureau Chief

E-mail: dana.bahar@state.nm.us;

Joe Godwin, Program Manager

E-mail: joe.godwin@state.nm.us;

Elmer Smith, Inspector of Record

E-mail: elmer.smith@state.nm.us

III. OTHER TERMS AND CONDITIONS

A. ENFORCEMENT

27. NMED retains the right to pursue any relief authorized by the HWA, the Regulations, or other law for any violation not addressed herein.

28. NMED retains the right to enforce this Final Order by administrative or judicial action.

29. In the event that NMED elects to file a judicial action to enforce this Final Order, the Parties agree that the First Judicial District Court of Santa Fe County, New Mexico shall have exclusive jurisdiction over the Parties and the Final Order. The Parties agree to waive any right to challenge that jurisdiction or venue lies with the First Judicial District Court of Santa Fe County, New Mexico.

30. The laws of the State of New Mexico shall govern the construction and interpretation of this Final Order.

B. BINDING EFFECT

31. This Final Order shall be binding upon NMED and its successor agencies and shall be binding upon Dale Bigler and Terry England and any successors-in-interest if there is

Settlement Agreement and Stipulated Final Order

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transfer of ownership for any storage tank systems under 20.5.102.201 NMAC.

C. EFFECTIVE DATE

32. This Final Order and any modifications thereto shall be effective when the Final Order or modification has been executed by both of the Parties.

D. INTEGRATION

33. This Final Order merges all prior written and oral communications between the Parties concerning the subject matter of this Final Order and contains the entire agreement between the Parties.

E. MODIFICATION

34. This Final Order shall not be modified except by express written agreement of both Parties.

F. RESERVATION OF RIGHTS AND DEFENSE

35. This Final Order shall not be construed to prohibit or limit NMED in any way from requiring Dale Bigler and Terry England, and any successors-in-interest if there is transfer of ownership for any storage tank systems under 20.5.102.201 NMAC, from complying with any state or federal requirements that are not resolved herein. This Final Order shall not be construed to prohibit or limit NMED in any way from seeking any relief authorized by the HWA or Regulations for violation of any state or federal requirement applicable to Dale Bigler and Terry England not resolved herein, including the issuance of penalties under NMSA 1978, Section 74-4-10 of the HWA. This Final Order shall not be construed to prohibit or limit Dale Bigler and Terry England in any way from raising any defense to a NMED action seeking such relief.

36. This Final Order shall not be construed to be a Compliance Determination

under 20.5.123 NMAC nor shall removal of the red tags eliminate any existing compliance issues at the Facility for the purpose of accessing the Corrective Action Fund in NMSA 1978, Section 74-6B-7 (2004). Dale Bigler and Terry England, and any successors-in-interest if there is transfer of ownership for any storage tank systems under 20.5.102.201 NMAC, shall be liable for any contamination discovered at the Facility during the terms of this Final Order. If there is discovery of a suspected or a confirmed release at the Facility, in addition to the suspected release that was discovered on September 29, 2021, Dale Bigler and Terry England, and any successors-in-interest if there is transfer of ownership for any storage tank systems under 20.5.102.201 NMAC, shall comply with the Regulations and HWA for investigating the suspected release and for any remediation that may follow, including but not limited to, conducting an investigation within seven calendar days of discovery of the suspected release and submitting an investigation report to NMED, as required by 20.5.118.1801(B) NMAC.

G. WAIVER OF STATE LIABILITY

37. Dale Bigler and Terry England, and any successors-in-interest if there is transfer of ownership for any storage tank systems under 20.5.102.201 NMAC, shall assume all costs and liabilities incurred in performing any obligation under this Final Order.

38. NMED, on its own behalf, and on behalf of the State of New Mexico, shall not assume any liability for the performance of any obligation under this Final Order.

H. DISCLOSURE TO SUCCESSORS-IN-INTEREST

39. Dale Bigler and Terry England shall disclose this Final Order to any successor-in-interest and shall advise such successor-in-interest that the Final Order is binding on the successor-in-interest. Dale Bigler and Terry England shall also copy the Bureau in such

correspondence using the contact information discussed in paragraph 26 of this Final Order.

J. AUTHORITY OF SIGNATORIES

40. The persons executing this Final Order represent that they have the requisite authority to bind either NMED or Dale Bigler and Terry England, as appropriate, to this Final Order, and that their representation shall be legally sufficient evidence of actual or apparent authority to bind NMED or Dale Bigler and Terry England to this Final Order.

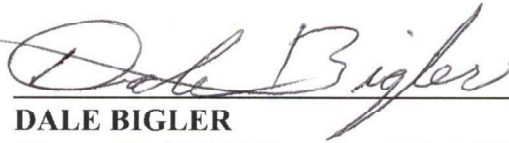
K. SIGNATURE AND COUNTERPARTS

41. This Final Order is intended to be executed on separate signature pages. Faxed, emailed, electronic, or digital signatures shall constitute original signatures binding on the signing party.

42. This Final Order may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement.

DALE BIGLER

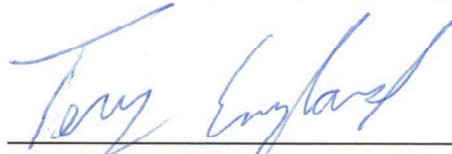
OWNER AND OPERATOR FOR MELROSE TIRE SERVICE INC.

BY: 
DALE BIGLER
(Owner ID #76316/Operator ID# P18911)

DATE: 10-27-2021

TERRY ENGLAND
OPERATOR FOR MELROSE TIRE SERVICE INC.

BY:



TERRY ENGLAND

(Owner ID #76316/Operator ID# P18911)

DATE:

10-27-2021

NEW MEXICO ENVIRONMENT DEPARTMENT

BY: **Stephanie Stringer** Digitally signed by Stephanie Stringer
Date: 2021.11.01 12:52:01 -06'00'
JAMES C. KENNEY
SECRETARY

DATE: _____